(2)

No. 06-35

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IN THE

Supreme Court of the United States

BEVERLY S. MALONE,

Petitioner,

v.

AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY and CHARLES W. STRUBE, INDIVIDUALLY AND AS TRUSTEE OF THE CHARLES W. STRUBE REVOCABLE TRUST, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY

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COUNTER-STATEMENT OF QUESTION PRESENTED

The parties to a class action agreed to settle their claims and to release all claims relating to the "marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation, performance, retention, administration and/or replacement" of annuities by respondent American Equity Investment Life Insurance Company ("American Equity" or the "Company"). Class member and petitioner Beverly Malone, who had filed her own putative class action against American Equity in Kentucky, objected to the class settlement because, *inter alia*, it contained a release provision that covered all of her claims against American Equity. The district court affirmed the settlement, but later attempted to modify the release to exclude certain of Malone's claims against American Equity from its scope. The Court of Appeals then affirmed the approval of the settlement, and reversed the district court's rulings with respect to the release, holding that all of Malone's claims against American Equity are released by the plain language of the settlement. The Court of Appeals accordingly entered an injunction barring Malone from litigating all such claims. The question presented is:

Did the Court of Appeals correctly apply the settled principle that the plain language of a class settlement agreement defines which claims are released, rather than the contrary language of the district court, which in this case attempted to modify the plain language of the settlement after the fact by carving out certain of the objector's claims from the scope of the release?

RULE 29.6 STATEMENT

Respondent American Equity Investment Life Insurance Company, a nongovernmental corporation, discloses that the following publicly-held corporation is its parent corporation and owns more than 10% of its stock: American Equity Investment Life Holding Company.

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INTRODUCTION

Malone's petition for a writ of certiorari raises no compelling question for the Court to decide. The decision of the Court of Appeals for the Eleventh Circuit in this case is grounded in principles of black letter law that have been widely adopted by this Court and the Circuit courts. In particular, when the Court of Appeals ruled that Malone, an objector to a class action settlement, was foreclosed by the settlement from litigating her suit in Kentucky, it correctly interpreted the settlement according to its plain language and not according to statements of the district judge that are contrary to the settlement's terms. In so ruling, the Court of Appeals created no conflict with any court and thus did not create a reason to grant a writ of certiorari.

In addition, Malone's petition fails to identify any issue that raises an important federal question or implicates any party other than Malone herself. Over the five years that this case has been pending, not one other member of Malone's putative class has come forward to express an interest in the issues that Malone raises before this Court. Moreover, Malone's allegation that she was denied due process is groundless: Malone has received all the process that she is due, with multiple hearings in the district court and review by the Court of Appeals. Malone's disappointment in the outcome is not a ground for certiorari, in particular where the Court based its ruling on settled legal principles and Malone's own representations regarding the basis of her claims.

Because Malone has failed to assert any compelling reason for Supreme Court review, American Equity respectfully requests that the Court deny Malone's petition.

STATEMENT OF THE CASE[1]

A. Strube's Action Against American Equity

Charles Strube filed a putative class action in Florida state court against American Equity in 2001, asserting claims based on alleged misrepresentations and omissions related to the sale of American Equity annuities, which plaintiffs claimed were generally inappropriate for the class. (*See* Dist. Ct. Ord. at 8a.)[2] In particular, plaintiffs alleged that American Equity employed a sales process in which agents met with elderly prospective purchasers, established relationships of trust and confidence, and then provided misleading information about annuities. (*Id.* at 11a.) American Equity later removed the action to the United States District Court for the Middle District of Florida. (*Id.* at 8a.) After years of litigation, in which American Equity successfully moved to dismiss a series of Strube's complaints, the district court held that plaintiffs had stated a claim and ordered the parties to engage in mediation. (*Id.* at 9a.) After months of negotiation, supervised by a court-appointed mediator, the parties reached a class settlement agreement. (*Id.*)

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[1] Malone's petition contains a number of misstatements regarding the facts and procedural history of this case, necessitating this response under Rule 15.2.

[2] Citations to the documents in petitioner's appendix reference the document name and the relevant page number there. (The pages in petitioner's appendix are numbered 1a-48a.) American Equity also submits and cites in this brief certain record materials that are included in its own appendix. (These documents are attached following the text of this brief, at pages 1b-12b.) Citations to these documents also reference the document name and relevant page number.

Meanwhile, also in 2001, Beverly Malone filed a putative class action against American Equity in Kentucky state court. (*Id.* at 31a.) Malone alleged that various persons and entities marketed and sold annuities that were allegedly inappropriate for Malone's putative class. According to Malone, the defendants sold annuities through the so-called "Trojan horse" of offering living trusts. (*Id.*; 11th Cir. Op. at 4a.) Specifically, Malone claimed the defendants "used their trust mill operation as a way to market [American Equity] annuities to the target base of elderly consumers." (*Id.* at 31a.)

Thus, as the Eleventh Circuit ultimately concluded, "[b]oth [Malone's] Kentucky litigation and the *Strube* action concern American Equity's marketing and sale of equity-indexed annuities." (11th Cir. Op. at 5a.)

B. The Settlement Agreement

The class settlement agreement executed by plaintiffs and American Equity provides a direct financial benefit to class members. Among other things, the settlement eliminates surrender penalties that otherwise would apply to annuity withdrawals by permitting class members to annuitize their funds immediately, without penalty, based on the contract value of the annuity plus a 2% bonus. (Dist. Ct. Ord. at 17a-18a.) Alternatively, if individual class members are dissatisfied with the general policy relief of a 2% bonus and immediate annuitization, the settlement allows them to seek individualized relief by submitting claims to a review panel. (*Id.* at 18a.) In addition to this economic relief, the settlement provides various forms of non-economic relief, including compliance with guidelines set forth by the Insurance Marketing Standards Association and enhanced training of

agents to ensure the high quality of American Equity's sales and marketing practices. (*Id.* at 16a-17a.) The non-economic relief provided by the settlement addresses the allegedly insufficient training of agents and allegedly improper methods of marketing and selling annuities complained of in the complaint. (*Id.* at 16a.) The district court found that the settlement offers the class an economic value of at least $14.7 million. (*Id.* at 27a.)

In exchange for these benefits under the settlement, the class members agree to release all claims they have relating to, *inter alia*, the marketing, solicitation, sale, and purchase of American Equity equity indexed annuities. (*Id.* at 19a.)

Contrary to the assertions in Malone's petition, the settlement in this case is not a "coupon" settlement (*i.e.*, a settlement in which the defendant offers only discounts on future purchases of the defendant's products). (*See* Pet. at 7, 25-26 (asserting that the settlement provides "just coupons for members of the class").) The settlement contains no provisions relating to coupons.[3] Also contrary to Malone's assertions, counsel for Strube and for American Equity did not "collude" in reaching the settlement. (*Id.* at 7, 8, 22, 25.)

[3] Coupon settlements, which include settlements that provide class members discount coupons and vouchers, recently have been subject to scrutiny because they sometimes offer limited material benefit to the class. *See* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 9 (2006) (noting that coupon settlements "do not necessarily benefit consumers" and may give class members a discount on "a product the class purportedly did not want in the first place"). Because of perceived abuses relating to coupon settlements, Congress addressed such settlements prominently in enacting the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1712 (2006).

To the contrary, the district court made a specific factual finding that there was no evidence of collusion or bad faith. (*See* Dist. Ct. Ord. at 40a.) Moreover, until filing her petition, Malone never claimed that the settlement was a "coupon" settlement or that plaintiffs' counsel will receive inappropriate fees as a result of the settlement. (*See* Pet. at 7, 25-26.)[4]

After a hearing, the district court entered an order granting the settlement preliminary approval. (Dist. Ct. Ord. at 9a.) The parties then sent notice of the settlement to the approximately 23,000 potential class members. (*Id.* at 10a.) Only 35 of these approximately 23,000 individuals opted to exclude themselves from the settlement class, and only three filed objections to the settlement. (*Id.*)

One of the three objectors was Malone, who since 2001 has pursued a class action against American Equity (and other

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[4] Arguments not asserted in lower court proceedings, such as objections to a settlement, may not be raised for the first time in an appeal to this Court. *See United States v. Galletti*, 541 U.S. 114, 120 n.2 (2004) ("Respondents have forfeited this argument by failing to raise it in the courts below."). Moreover, arguments not previously asserted are waived and cannot constitute a reason for granting a writ of certiorari. *See also Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court"; "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.") (citations omitted)); *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157, 160 (1950) ("We will not review questions not clearly raised on the record.").

defendants) in Kentucky.[5] (*Id.* at 10a, 30a.) Like the other potential class members, Malone had the opportunity to opt out of the settlement class, and thus she could have preserved her individual claims against American Equity. Instead, Malone chose to remain in the class and object to the settlement. Malone objected because the settlement stood to release the claims she was asserting against American Equity in her Kentucky action, including claims purportedly relating to the sale of living trusts. (*See* Pet. at 8 (explaining that Malone argued in her objections "that the proposed settlement agreement was overbroad, would release the respondent from responsibility for its egregious fraud in Kentucky in selling the *living trust investment vehicle*" (emphasis in original)).)

The district court conducted a final fairness hearing on the settlement, and heard argument from Strube, American Equity, and a few objectors, including Malone. (Dist. Ct. Ord. at 10a.) Thereafter, the parties filed an amended agreement, which incorporated a few additional terms the court had requested, and to which the parties had agreed, during the final fairness hearing. (*Id.*)[6] Although Malone had objected to the release, the court did not request that the parties modify the release. (*Id.* at 34a-35a ("the release and waiver provision contained in the proposed settlement is appropriate").)

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[5] Malone's class action is now pending in Jefferson Circuit Court in Louisville, Kentucky.

[6] These additional terms included a provision stating that the district court retains jurisdiction to enforce the settlement, and a minor modification of the individual claims review process.

C. Final Approval of the Settlement Agreement

The district court subsequently entered an order granting final approval of the settlement agreement. (*Id.* at 40a.) In so ruling, the court approved the release of claims under the settlement. (*Id.* at 34a-35a.) The approved release provides that "Plaintiffs and all Class members" "fully, finally, and forever release and discharge the Releasees" (*i.e.*, American Equity and its agents) from:

> any and all causes of action, claims, damages . . . that have been, could have been, may be or could be alleged or asserted now or in the future by Plaintiffs or any Class Member against the Releasees or any of them in the Action or in any other court action . . . *on the basis of, connected with, arising out of, or related to, in whole or in part, the Released Transactions.*

(*Id.* at 19a (emphasis added).) The Released Transactions, as defined in the settlement, encompass:

> the *marketing*, *solicitation*, application, underwriting, acceptance, *sale*, *purchase*, operation, performance, retention, administration and/or replacement (by means of surrender, partial surrender, withdrawal and/or termination of any policy) of the [covered annuities].

(*Id.* (emphasis added).)

The district court approved the settlement as submitted, and thus overruled all of Malone's objections, including her objection that the release is impermissibly broad. (*Id.* at 30a.) Indeed, the court explicitly held: "the release and waiver provision contained in the proposed settlement is appropriate."

(*Id.* at 34a-35a.) Malone then appealed from the district court's approval of the settlement agreement.

D. Malone's Continued Litigation After Approval of the Settlement

After the district court approved the settlement, Malone continued to litigate her claims against American Equity in Kentucky—despite her many prior admissions that the settlement releases all of her claims against American Equity. (*See, e.g.*, Malone's Supplemental Resp. to Proposed Revisions at 8b.) Once the settlement was approved, Malone changed her position on the release, and announced that some of her claims survived the settlement, only under a new name: "living trust claims." Thus, although Malone had argued for years that living trusts were merely a marketing tool for selling annuities—as she had put it, living trusts were a "Trojan horse" for annuity sales (*see* 11th Cir. Op. at 4(a))[7]—and had told the court that the settlement released *all* of her claims against American Equity, she refused to dismiss her claims now that the settlement was approved.

E. American Equity's Motion for an Injunction

Malone's claims are released by the settlement agreement, no matter what Malone may decide to call those claims today. Thus, to bar Malone from continuing to pursue her claims against American Equity after the approval of the settlement, American Equity moved in the district court for an injunction. As American Equity explained, the settlement releases all of Malone's claims against American Equity, including the claims she now calls "living trust claims":

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[7] Malone's repeated assertions that living trusts were merely a marketing tool to sell annuities are set forth in further detail at pages 23-26 of American Equity's opening brief in the Eleventh Circuit.

- the plain language of the release covers all claims relating to the marketing, solicitation, purchase, and sale of American Equity annuities;

- Malone's so-called "living trust claims" were based on the allegation that American Equity was involved in living trust sales in order to advance the marketing, solicitation, purchase, and sale of its annuities—as Malone had conceded numerous times.[8]

Malone opposed American Equity's injunction motion, arguing—in an about-face from her prior concessions—that her claims against American Equity based on living trusts are not released under the settlement. (Malone's Resp. to Injunction Motion at 6b.) Malone did not argue that her living trust claims against American Equity are not covered by the plain language of the release. Nor did she try to disavow her former concessions that the settlement releases her living trust claims against American Equity or deny her many assertions to the effect that her so-called "living trust claims" against American Equity relate directly to the marketing, solicitation, sale, and purchase of annuities. Rather, Malone relied on the statement of the district court, in its approval of the settlement, that "[a]lthough some of the defendants in Malone's Kentucky suit are included in the release insofar as they are agents of Defendant for the purpose of selling those products, nothing in the settlement agreement should be interpreted to preclude any claim made by Malone or

[8] That the settlement released Malone's so-called "living trust claims" was at the heart of Malone's objection, as she had directly argued: "'the Court should reject the proposed release because it insulates American Equity from potential liability arising from the sale of living trusts.'" (Malone's Supplemental Resp. to Proposed Revisions at 8b.)

another class member similarly situated with regard to the marketing, preparation or sale of living trusts." Malone has conceded that this statement by the district court contradicts the plain language of the release. (Malone's 11th Cir. Opening Br. at 10b (asserting existence of "inconsistency between the language of a class action release and the district court's interpretation of that language"); (Malone's 11th Cir. Reply Br. at 12b ("There is no dispute that the district court's opinion approving the settlement is 'at odds' with the language of the proposed release.").)

Nevertheless, Malone took the position in opposing the requested injunction that the court had modified the settlement by excluding Malone's living trust claims from the release (Tr. of Hearing on Inj. Mot. at 21:5 - 22:10, appearing in the attachments hereto at 3b)—notwithstanding this Court's ruling in *Evans v. Jeff D.*, 475 U.S. 717 (1986) that district courts may *not* unilaterally modify the terms of settlement agreements. Indeed, the district court had no authority to modify the settlement absent the parties' consent, and the plain language of the settlement, not contrary language in a district court opinion, governs the scope of the release. (*Infra* Reasons for Denying the Writ § I.)

Regardless, the district stated that it had not intended to release Malone's so-called "living trust claims" against American Equity and that it had "tried . . . to exclude" "living trust claims" from the release. (*Id.* at 10:19-21, appearing in the attachments hereto at 2b.) Based on this view, the court denied the injunction motion. (*Id.* at 27:18, appearing in the attachments hereto at 4b.) American Equity then appealed that denial, and consolidated its appeal with Malone's appeal from the approval of the settlement.

F. The Consolidated Appeals

In her appeal from the approval of the settlement, Malone only raised issues concerning the scope of the release. (Malone's 11th Cir. Opening Br. at 9b-10b.) Malone questioned whether the district court erred in approving a settlement that "could operate to release" her living trust claims against American Equity and whether the settlement was fair, adequate, and reasonable if it did release those claims. (*Id.*)

In response, American Equity reiterated that the settlement does release Malone's so-called living trust claims against American Equity, because (as Malone herself recognized) the plain language of the release covers those claims. Further, American Equity explained that the district court did not modify the settlement, even though it apparently tried to exclude "living trust claims" from the release, because a district court has no power to modify a settlement without the parties' consent.

G. The Court of Appeals Affirms the Settlement and Enters an Injunction Against Malone

The Court of Appeals resolved the appeals by affirming the approval of the settlement and enjoining Malone from maintaining her claims against American Equity, as those claims are released by the plain language of the agreement. (11th Cir. Op. at 5a-6a.) The Court of Appeals based its ruling on two bedrock principles governing the interpretation of settlements: namely, that the plain language of a settlement determines its meaning (*id.* at 4a (citing *Waters v. Int'l Precious Metals Corp.*, 237 F.3d 1273, 1276-77 (11th Cir. 2001)), and that a court has no power to modify a settlement without the consent of the parties. (*Id.* at 3a-4a (citing *Evans*, 475 U.S. at 726).)

Applying these principles, and relying on American Equity's and Malone's statements that the release covers Malone's so-called "living trust claims" against American Equity, the Court of Appeals held: "the terms of the settlement agreement release American Equity from any potential liability concerning Malone's living trust." (*Id.* at 4a.) The Court of Appeals also held that the plain language of the settlement, which dictates that Malone's living trust claims against American Equity are released, necessarily trumps any contrary "interpretive gloss[]" of the district court, because a settlement's plain language determines its meaning. (*Id.*) Further, the Court of Appeals rejected Malone's argument that the release is overbroad in releasing claims Malone contended are based on a different factual predicate. Indeed, the Court of Appeals refused to accept even Malone's underlying contention that Strube's claims and her "living trust claims" involve different factual predicates, because, as the Court of Appeals observed, Strube's claims and Malone's claims—including her "living trust claims"—both concern the sale of annuities. (*Id.* at 5a.)

Based on the holdings that the plain language of the settlement releases Malone's living trust claims against American Equity and that the settlement bars Malone's action against American Equity, the Court of Appeals entered a permanent injunction barring Malone from maintaining her Kentucky suit against American Equity. (*Id.* at 6a.) However, Malone has taken no steps to comply with the injunction and instead *has* maintained her Kentucky action by opposing the dismissal of the case in Kentucky state court (although Malone apparently has taken no particular steps to advance the Kentucky action). To date, and at Malone's insistence, the Kentucky court has declined to dismiss Malone's claims, despite the federal injunction barring the action.

REASONS FOR DENYING THE PETITION

Malone's Petition Fails to Identify Any Issue Warranting the Court's Review

The Court's Rules instruct that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Supreme Court Rule 10 outlines three categories of reasons that may compel the Court to grant a writ of certiorari: (i) the existence of a conflict between federal appellate courts or state courts of last resort; (ii) the raising of an important federal question; and (iii) the need for the Court to exercise its supervisory powers. *Id.*[9] None of these reasons is identified in Malone's petition, nor is any of them present in the circumstances of this case.

Other considerations articulated in Rule 10 also counsel against granting Malone's petition. The Rule provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*; *see also NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981) (certiorari improvidently granted where question of fact predominated).

The error asserted by Malone in the Court of Appeals' decision, though misconceived, concerns either an allegedly erroneous factual finding or a claimed misapplication of a properly stated rule of law. Malone agrees with American Equity and the Court of Appeals below on the dispositive principle of law: in particular, that a court cannot modify a

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[9] *See also* Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002).

settlement absent the parties' consent. (Pet. at 16 (citing *Evans*, 475 U.S. 717, 727 (1986)).) Malone's petition claims, however, that the Court of Appeals either made an incorrect factual finding in holding that the settlement releases her living trust claims or that the Court of Appeals erred in its application of law when it created what Malone calls "a new settlement" and held that the settlement releases her so-called "living trust claims" against American Equity. (Pet. at 14, 22.) As noted, such claimed errors do not constitute reasons for granting a writ of certiorari.

I. There is No Conflict Between the Courts.

Malone's petition for certiorari identifies no conflict between federal appellate courts or state courts of last resort, nor does it identify any conflict with a prior decision of this Court. As explained above, the relevant legal principles governing the interpretation of settlements—namely, that a settlement is governed by its plain language and that a court may not modify a settlement absent the parties' consent—have been articulated by this Court and unanimously embraced by the Circuit courts. *See Evans v. Jeff D.*, 475 U.S. 717, 726 (1986). *See also, e.g., Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 299 (4th Cir. 2000) ("Authority to enforce [a settlement] agreement, however, applies to the agreement in its entirety, not to such selected parts that the court deems appropriate."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("Neither the district court nor this court have the ability to 'delete, modify or substitute certain provisions.' The settlement must stand or fall in its entirety." (quoting *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982))); *In re Asbestos Litig.*, 90 F.3d 963, 1025 (5th Cir. 1996) ("In reviewing the approval

of a class action settlement, we may not modify the terms of the settlement but must approve or disapprove it in its entirety."); *Walitalo v. Iacocca*, 968 F.2d 741, 750 (8th Cir. 1992) ("By imposing [additional] liability on [defendant] . . . the court impermissibly altered the parties' settlement agreements."); *Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 130 (3d Cir. 1991) ("We need not decide whether we are limited to either approval or disapproval of the terms of the present agreement. . . ." (citing *Evans*, 475 U.S. at 727 & n.13)); *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) ("Ultimately, the district court is faced with the option of either approving or denying the decree; 'the settlement must stand or fall as a whole.'" (quoting *Officers for Justice*, 688 F.2d at 630)); *Brown v. County of Genesee*, 872 F.2d 169, 173 (6th Cir. 1989) (per curiam) ("It is well established that a 'court must enforce the settlement as agreed to by the parties and is not permitted to alter the terms of the agreement.'" (quoting *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988))); *In re Warner Commc'ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("[I]t is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms."); *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (D.C. Cir. 1986) ("According to the Supreme Court, Rule 23(e) of the Federal Rules of Civil Procedure does not permit a court to materially modify a proposed settlement and order its acceptance over either party's objection."); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983) ("Courts are not permitted to modify settlement terms or in any manner to rewrite the agreement reached by the parties."); *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977) ("[Courts] are not free to delete, modify, or substitute certain provisions of the settlement. The settlement must stand or fall as a

whole."); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974) ("[I]t was an abuse of discretion for the district court to effectively change the settlement from one providing for dismissal of plaintiffs' complaints with prejudice to one providing for the dismissal without prejudice.").

The Court of Appeals below correctly stated and applied these uncontroversial legal principles when it affirmed the approval of the settlement and enjoined Malone from maintaining her suit against American Equity. Thus, the Court of Appeals' decision is in accord, not conflict, with the decisions of other Circuit courts and the precedent of this Court.

Although Malone fails to identify any conflict with the decisions of other Circuit courts, she contends that the Court of Appeals' decision below somehow ignores this Court's holding in *Evans*, that a court may not modify a settlement agreement without the agreement of the parties. (Pet. at 22.) However, the premise on which this contention proceeds—that the Court of Appeals created "an entirely new class action settlement agreement" in holding that the settlement releases Malone's so-called "living trust claims" against American Equity (*id.*)—is baseless. As explained above, the Court of Appeals' holding that Malone's claims are released does not create a new agreement but, rather, is consistent with the plain language of the release (and with Malone's concessions). (*See* Statement of the Case § B *supra* (citing Pet. at 8).)

II. There Is No Important Question of Federal Law, as the Eleventh Circuit Simply Reached a Correct Result by Applying Well-Established Legal Principles to Admitted Facts.

A. The Petition Raises No Important Question of Federal Law.

Malone's petition also fails to identify any important question of federal law to justify a grant of certiorari. This case simply concerns the interpretation of a settlement agreement that has received significant challenge from only one of approximately 23,000 class members, and it presents no particular issue of importance to warrant the Court's review. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (dismissing writ of certiorari as improvidently granted where there were no "special and important reasons" to justify review and stating, the "Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."). This case presents none of the sorts of important issues the Court has recognized as warranting review, such as a constitutional challenge, *see United States v. Gainey,* 380 U.S. 63 (1965), an issue affecting the administration of a federal statute, *see Nat'l Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978), or a decision of potential import to many individuals. *See also Patterson v. Lamb*, 329 U.S. 539 (1947).

Here, Malone has not shown that the rulings below significantly affect anyone but herself.[10] The Court has stated

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[10] Indeed, this fact alone distinguishes this case from *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), in which the Court reviewed whether an asbestos settlement class, one that was larger

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that when a case is unlikely to be important to the public, as distinguished from the parties, the writ should be denied. *See Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.").

Malone also tries to create the appearance of a federal issue by attempting to invoke Rule 23 of the Federal Rules of Civil Procedure and the Class Action Fairness Act. (Pet. at 25.) However, Malone does not (and cannot) assert that this case involves any actual violation of either Rule 23 or CAFA. Malone has never before claimed any such violation, and thus has waived any such argument in this Court. Further, Malone's "factual" contentions in support of the claimed violation—such as her claim that the settlement "provide[s] . . . just coupons for members of the class" (Pet. at 7)—have no basis in fact. (*See supra* at 4.) Malone's suggestion that the settlement somehow violates the spirit of Rule 23 and CAFA (if not their actual provisions) is also unavailing. The

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than any other class brought to the Court's attention, had common questions of law and fact under Federal Rule of Civil Procedure 23. *Id.* at 597. Unlike this case, in *Amchem*, the Court found that there was a divergence of interests that separated the class, namely the fact that there were plaintiffs already afflicted with an asbestos-related disease, such as lung cancer, and plaintiffs that did not manifest any injury. *Id.* at 610. Unlike *Amchem*, the class members here, including Malone, allegedly suffered the same types of injuries.

settlement has been closely scrutinized and, upon that scrutiny, has been approved and then affirmed.

The class settlement here, negotiated at arms' length over months, provides real and substantial benefits to the class in response to the issues complained of in the underlying complaint. It was overwhelmingly approved by the approximately 23,000 members of the class. There is no basis for Malone's contention that the settlement is not in accord with provisions of federal law governing class actions.

B. The Court of Appeals Applied Well-Settled Principles in Giving Effect to the Plain Language of the Settlement, Rather than the Contrary "Interpretation" of the District Court.

It is well-settled that settlement agreements are contracts and that, as such, they are governed by principles of contract law. *See Waters v. Int'l Precious Metals Corp.*, 237 F.3d 1273, 1277 (11th Cir. 2001). Thus, under basic principles of contract interpretation, courts should give the terms of a settlement their "plain and ordinary meaning" and not "add or subtract language from a clearly worded agreement." *Id.* This is so because a settlement, as a contract, is governed by its plain language meaning and because a court has no power to change the terms of a settlement or to "require the parties to accept a settlement to which they have not agreed." *Evans*, 475 U.S. at 726 (1986).

The unambiguous language of the settlement provides that in exchange for various forms of economic and non-economic relief, class members agree to release any claims they have against American Equity that are "on the basis of, connected with, arising out of, or related to, in whole or in

part" "the marketing, solicitation, application, underwriting, acceptance, sale, purchase, operation, performance, retention, administration and/or replacement" of covered equity indexed annuities. (Dist. Ct. Ord. at 19a.) It is plain, and it has been admitted by Malone numerous times, that this release covers all claims Malone has asserted against American Equity in her Kentucky action, including her so-called "living trust claims," because all such claims are based on the marketing and sale of annuities. (*See* Statement of the Case § B *supra* (citing Pet. at 8).)

The well-established line of precedent regarding the interpretation of settlements makes plain that the district judge's attempt to carve out claims from the release without the parties' consent was contrary to law. It is equally clear that the Court of Appeals applied well-settled legal principles in enforcing the settlement according to its plain language rather than a contrary "interpretation" of the district court.[11]

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[11] Thus, the Court of Appeals' application of settled law is unlike the cases Malone cites regarding the interpretation of positive law in a way that was unforeseen, unexpected, or indefensible. (Pet. at 22-23.) In addition, Malone identifies no factual similarities between this case and the cases she cites in her brief, such as *Bush v. Gore*, 531 U.S. 98, 118 (2000), a case reviewing the Florida Supreme Court's application of certification provisions enacted by the Florida legislature for resolving presidential election contests; *Wright v .Georgia*, 373 U.S. 284, 289-91, 293 (1963), a case finding a breach of the peace statute unconstitutional where it did not provide adequate notice to a group of African Americans that playing basketball in a public park was prohibited by the statute; and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), which held that petitioner could not fairly be deemed to have been apprised of the court's novel procedural requirements which would prevent the court from reviewing federal constitutional rights when the court

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C. The Court of Appeals Correctly Affirmed the Approval of the Settlement on Fairness Grounds.

In determining whether to approve a settlement agreement, a district court evaluates the fairness, reasonableness and adequacy of the settlement as a whole. *In re Warner Commc'ns Sec. Litig.*, 798 F.2d at 37. The Court of Appeals reviewed the district court's decision to approve the settlement under the abuse of discretion standard, "consider[ing] the effect of the settlement as a whole" and evaluating the settlement "in its entirety." (11th Cir. Op. at 5a (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) and *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977)).) The Court of Appeals ultimately determined to "leave untouched the district court's approval of the settlement agreement." (11th Cir. Op. at 5a.) The Court of Appeals based its holding on fairness considerations in the context of the settlement as a whole. Thus, the Court of Appeals emphasized that apparently no other class members shared Malone's objections and that her objections were "peripheral to the chief bargains struck between the plaintiff class and American Equity." (*Id.*)

Further, the Court of Appeals correctly rejected Malone's objections as insufficient challenges to the settlement, largely

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had previously reviewed such rights in other cases. It is self-evident that these cases have nothing to do with the issues Malone seeks to raise. Indeed, the common thread that runs through *Bush*, *Wright*, and *N.A.A.C.P.* is the Court's unwillingness to hold parties accountable for a peculiar or novel application of law. But the precedent applied by the Court of Appeals was grounded in settled law, and far from a novel approach regarding the interpretation of settlement agreements.

because her objections proved upon scrutiny to be without basis. For example, the Court of Appeals rejected Malone's argument that the settlement impermissibly released claims, like her so-called "living trust claims," that supposedly concern a different factual predicate. *Id.* (concluding in response to the contention that Malone's claims concern a different factual predicate than Strube's: "We do not find that to be the case.").)[12]

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[12] Malone's assertion that a global release of claims against parties not before the court must be based upon an *identical* factual predicate is not examined in *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 376-77 (1996) as Malone suggests. The issue in *Matsushita* was whether a state court settlement judgment was entitled to full faith and credit to bar litigation of federal claims notwithstanding the fact that the settlement released claims within the exclusive jurisdiction of the federal court. In holding that the settlement agreement acted as a bar, the *Matsushita* court's analysis was focused on the preclusive effect of 28 U.S.C. § 1738 on federal actions rather than an analysis of the underlying factual predicates in the concurrent cases. *Matsushita Elec. Indus. Corp.*, 516 U.S. at 376-77. Moreover, *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1563 (3d Cir. 1994) similarly did not apply the rigid rule that such factual predicates must be "identical" for claims to be released. Rather, the test applied in *Grimes* is that the claims must arise from the same nucleus of operative facts. 17 F.3d at 1563. Indeed, in *Grimes*, the court found that where language of a broad release manifests an intent by the parties to settle all claims arising from a merger transaction, federal claims for breaches of fiduciary duties were barred where claims for nondisclosure were already litigated in the state court. *See also In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 512-13 (E.D.N.Y. 2003) (holding claims were extinguished when there was sufficient overlap between facts underlying claims in settled case and facts underlying other actions), *aff'd by Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d. Cir. 2005), *cert. denied by Leonard's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005).

As the Court of Appeals noted, Malone's own statements, in which she repeatedly contended that American Equity used living trusts as a tool to market and sell annuities, flatly refute the contention that her so-called "living trust claims" against American Equity involve a different set of facts.[13] (*See* Statement of the Case § G *supra*.)

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[13] In addition, Malone's own authorities disprove her argument that her so-called living trust claims are somehow based on a different factual predicate. *See, e.g., Williams v. General Elec. Capital Auto Lease, Inc.*, 159 F.3d 266, 274 (7th Cir. 1998) (finding that class was enjoined from proceeding with litigation where claims in second action, although not resulting from termination of automobile leases, were "closely enough related to the disclosure claims" released in the settlement of the first class action where class members had terminated leases and were assessed with early termination and default charges); *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 326 (3d Cir. 1998) (finding that category of other claims was appropriately included in settlement release where such claims were "part and parcel of the 'common scheme' which underlies plaintiff's entire case"); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (upholding bar of state appraisal proceeding action when federal action for breach of lease, breach of fiduciary duty related to value of lease, and misstatements in connection with value of reversionary interest under lease, would essentially settle valuation issues that would "lie at the heart of an appraisal proceeding"); *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D 457, 470-473 (S.D. Fla. 2002) (finding release precluding class members from bringing accessibility claims was fair, adequate and reasonable, even though release also barred class members from bringing accessibility claims under state law).

Moreover, the similar factual predicate between the "living trust claims" and the Strube claims makes *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 16-18 (2d Cir. 1981), a case heavily relied upon by Malone, inapposite. In *Super Spuds*, the

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D. Malone's Contention that the Court of Appeals Changed the Settlement is Belied by Her own Admissions.

Malone contends in her petition that the settlement does not release her so-called "living trust claims" and that the Court of Appeals, in holding that the settlement *does* release her living trust claims, somehow changed the settlement. (Pet. at 22.) This contention is directly refuted by Malone's own statements, including her objection that the release provision is overbroad because it releases her "living trust claims" against American Equity. (*See* Statement of the Case § B *supra* (citing Pet. at 8).)[14] Thus, Malone's claim that the Court of Appeals "changed" the settlement by holding that it releases her "living trust claims" is baseless, because this holding is consistent with Malone's own view of the settlement.[15] Indeed, based on such statements

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court found that a class action alleging wrongful conduct that depressed the price of futures contracts thereby causing injury to persons who liquidated long positions was distinct from an action based upon the non-delivery of unliquidated futures contracts. *Id.* at 20-21. Thus, Malone's reliance on *Super Spuds* assumes findings of fact that are directly contrary to those of the Court of Appeals and is misplaced.

[14] The district court also observed, with respect to Malone's objections: "Malone argues that the release provision in the settlement would operate to shield . . . [American Equity] . . . from liability on the claims of the class she seeks to represent relating to the improper use of living trusts in marketing annuities." (Dist. Ct. Ord. at 31a-32a.)

[15] Among the many statements by Malone that reflect her understanding that the settlement, by its terms, releases her so-called "living trust claims" against American Equity is her unequivocal urging that the district court "reject the proposed release because it insulates American Equity from potential liability arising from the sale of living trusts." (Malone's Supplemental Resp. to Proposed Revisions at 8b.)

by Malone, the Court of Appeals concluded: "Malone . . . recognize[s] that the plain language of the settlement forbids Malone from maintaining her action against American Equity in Kentucky for claims arising out of [its] creation of a living trust for her." (11th Cir. Op. at 4a.) Although Malone purports to find the Court of Appeals' conclusion that Malone recognizes that the settlement releases her so-called "living trust claims" against American Equity "inexplicable" (Pet. at 13), she need only look to her own statements, and the plain language of the agreement, for the explanation.[16]

Moreover, Malone's contention that the Court of Appeals changed the settlement in holding that it releases her so-called "living trust claims" against American Equity contradicts her own prior assertions that the *district court* changed (or tried to change) the settlement by excluding such claims.[17] Thus, Malone's own statements confirm that the district court changed the settlement in attempting to hold that the settlement would not release so-called "living trust claims" against American Equity.[18] Malone cannot now disavow this

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[16] Tellingly, Malone cites no portion of the record in which she argued that the release does not cover her so-called "living trust claims" against American Equity.

[17] For example, in describing the district court's statements with respect to the release of Malone's "living trust claims," Malone wrote: "[t]here is no dispute that the district court's opinion approving the settlement opinion is 'at odds' with the language of the proposed release." (Malone's 11th Cir. Reply Br. at 12b.)

[18] For these reasons, Malone's "questions presented" and "reasons for granting the petition" are similarly misleading. The first question presented mischaracterizes the decision of the appeals court as

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position, in an attempt to create an issue warranting review, by arguing that the Court of Appeals changed the settlement in holding that the settlement does release "living trust claims" against American Equity.[19]

Likewise, Malone's contention that American Equity represented in the district court that the settlement would not release her "living trust claims" against American Equity is baseless. American Equity repeatedly and at all times argued that the settlement releases *all* of Malone's claims against American Equity. Malone has no support for her

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"chang[ing] the terms of a class action settlement agreement," when in fact, the appeals court applied the settlement agreement according to its plain terms. (*See* Pet. at i, 14.) The second question presented makes the same erroneous assumption when stating, "the court of appeals' decision to impose upon the parties at the appellate level an entirely new class action settlement." (*See id.* at (i), 14, 22-23). As discussed, Malone's own statements show that the district court, and not the Court of Appeals, changed the settlement agreement.

[19] Malone's admissions illustrate that this case is unlike *System Federation No. 91, Railway Employees' Department v. Wright*, 364 U.S. 642, 651 (1961), which Malone cites for the proposition that judicial discretion may call for the modification of the terms of an injunctive decree if there are intervening circumstances, such as a change in the law or facts. (Pet. at 23-24.) In *Wright*, the court ordered a modification of a consent decree to allow for union shop agreements that were subsequently made legal by an amendment to the Railway Act. 364 U.S. at 649. Unlike the intervening change of law in *Wright*, the Court of Appeals' interpretation of the settlement was neither a change in the law nor a "new interpretation" but, rather, the enforcement of the plain language of the settlement approved by the district court.

contention that American Equity ever argued otherwise. But in an attempt to bolster this contention, Malone emphasizes a single statement made by American Equity's counsel at a hearing:

> There are defendants in the *Malone* case, including the attorneys and including some of the McIntyre-related entities that are not our agents and that are not released by this release. So, the *Malone* case can continue against those entities as a putative class action. What it cannot do is continue against us, based on the sale of annuities, because that is what is released here.

(Pet. at 9.) Malone distorts American Equity's statement in contending it is an admission that the "release addressed only [American Equity's] direct sale of annuities to the elderly and *not* its sale of living trusts." (*Id.* at 21.) As the statement itself demonstrates, American Equity simply stated that Malone's Kentucky case includes defendants that are not American Equity's agents, that the release does not cover claims against such non-agent defendants, and that Malone cannot proceed with her claims against American Equity because those claims are based on the sale of annuities and thus are released. Malone's suggestion that American Equity represented that the release does not cover her "living trust claims" is simply false: American Equity never made such a representation.[20]

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[20] Malone resorts to mischaracterizing the record in an effort to manufacture this issue. For example, Malone purports to quote the district court as follows: "Judge Fawsett justifiably relied upon the serial admissions by the respondent's lead counsel below 'that the release would serve to bar only those claims *relating directly* to

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E. Malone's Contention that She Has Been Denied Due Process is Without Support.

Malone asserts in conclusory fashion that the proceedings below somehow denied her due process. (*See* Pet. at 26.) But Malone nowhere identifies any specific process she believes she was due, and in fact she has been accorded substantial process in her challenges to the settlement. The district court heard and responded to Malone's initial objections, and the Court of Appeals later entertained her challenges to the approval of the settlement.[21]

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the marketing and sale of such annuities,' *not* living trusts." (Pet. at 17-18 (quoting Dist. Ct. Ord. at 34a).) But Malone adds the language "not living trusts" to her ostensible "quote" of the court. American Equity was clear throughout its papers and during hearings that the release covered *all* of Malone's claims against American Equity, because *all* such claims concern the marketing, purchase, sale, and solicitation of annuities.

[21] Because Malone has had an opportunity to be heard in the district court regarding the approval of the settlement agreement and again on appeal before the Eleventh Circuit, Malone's due process authorities are off-point. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (United States citizen held as enemy combatant entitled to opportunity to contest basis for detention); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 541 (1985) (due process required that terminated employees have pre-termination opportunity to respond and post-termination administrative procedures); *Goldberg v. Kelly*, 397 U.S. 254, 275 (1970) (Black, J. dissenting) (evidentiary hearing required prior to termination of public assistance payments). In addition, Malone had the opportunity to opt out of the settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985) (finding class action notice to out-of-state plaintiffs containing explanation of opt-out right with no concurrent requirement to "opt in" satisfied due process).

That Malone now is foreclosed from pursuing her so-called living trust claims is not a denial of due process. Rather, it is simply the result of Malone's decision not to opt out of the settlement; had she opted out, she could have preserved her individual claims against American Equity.[22]

III. This Case Does Not Require the Court to Exercise its Supervisory Powers.

This case also does not call upon the Court to exercise its supervisory powers. Such cases generally involve issues concerning federal jurisdiction, practice, and procedure. *See, e.g., Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (reviewing ability of federal court, under multidistrict litigation statute, to invoke change of venue statute); *McKnight v. General Motors Corp.*, 511 U.S. 659, 659 (1994) (granting certiorari to resolve disagreement between district courts on retroactive application of civil rights act provision). Malone describes the Court of Appeals' interpretation of the settlement agreement as an "intervening change in the law" in an attempt to invoke the Court's "equitable power to modify the court of appeals' ruling so that the ruling does not become an 'instrument of wrong.'" (Pet. at 23.) But as discussed above, the Court of Appeals' ruling did not constitute a "change in the law"; rather, it simply gave effect to the plain language of the agreement.

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[22] *See DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995) (holding that class members who objected to settlement in district court and again on appeal were subject to release under settlement and "waived any potential due process requirement that would allow them to pursue their claims again in another forum"). *See also Phillips Petroleum Co.*, 472 U.S. at 811-12 (holding that due process in class actions requires providing class members notice, opportunity to participate in litigation, and opportunity to opt out of class).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

EXCERPTS OF TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING, DATED MAY 19, 2005

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO: 6:01-CV-1236-ORL-19DAB

CHARLES W. STRUBE,

PLAINTIFF,

vs.

AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY,

DEFENDANT.

THURSDAY, MAY 19, 2005

EXCERPTS OF PRELIMINARY INJUNCTION HEARING BEFORE THE HONORABLE PATRICIA C. FAWSETT CHIEF UNITED STATES DISTRICT JUDGE ORLANDO, FLORIDA

[9] * * *

MR. SMITH: The issue here is whether the language of the release covers the claims in the case. Because this court,

in its opinion, could approve or disapprove the release. Under the law, it could not alter the release without the consent of the parties.

And the scope of the release is clear. It refers to [10] all claims that could have been, may be or could be alleged by any class member on the basis of connected with, arising out of or related to, in whole or in part, the release transactions.

And the release transactions shall mean, and I'm excerpting, but the marketing and sale of the policies. Mrs. Malone bought a policy. The allegations against American Equity in her case are that the marketing and sale of that policy, through the use of a living trust, was improper.

That is directly in the four corners of the release. We all knew when we stood here in this courtroom and argued on the Malone objection that if the Court approved the settlement without modification of the release, that the Malone case was going away. That is why they fought so hard.

THE COURT: Let me opt out of that sentence. I did not include myself in that.

MR. SMITH: And I did not mean to include the Court in it.

THE COURT: And I tried very hard in my order to exclude the living trust issue, because that is what Ms. Malone's attorney came down and argued to me.

[20] * * *

MR. McMURRY: * * * Your Honor, with respect to your order going down, as you described, certainly we lose the right to claim damages [21] that we were claiming before for contract rescission. We now lose the right for the return of surrender charges paid, discordsman of profits that American Equity made on the sale of those very annuities. We recognize that.

But one glorious thing we do recognize is that this Court did what this Court had the authority to do. And that is to say, gentlemen, this order will not impede Mrs. Malone's ability to go to Kentucky and pursue her claims against everyone directly relating to the sale of living trusts.

And those give rise to other damages entirely like we've discussed here today, the $2,000 cost to the living trust, the $30,000 in tax liability for the sale, liquidation of all of her assets. Those are the kinds of damages we intend to pursue, based upon this order.

You know, it's very interesting that today I heard for the first time that this court didn't have the authority to alter or amend, without agreement of the parties, the terms of the release.

The Court will notice that in the stipulation and agreement that was entered into in this case, paragraph 11 reads — and this was done after you had the hearing. This was the amended stipulation. It reads: "Changes only by court order. The terms and provisions of this agreement — and this agreement defined what were released transactions — may be amended, modified, expanded, or terminated only

by [22] order of the Court which shall retain jurisdiction to enforce the terms thereof."

Nowhere does it say that there has to be an agreement by the parties for this court to interpret this particular release. The Court had the authority to do it. I was happy with it. We were certainly disappointed that we're going to lose some of our damages in the Kentucky case, but we were delighted that we at least could keep them in the court, hold them accountable for that part of their responsibility in the living trust scam.

[27] * * *

THE COURT: * * * So, I am going to deny the motion. And I will just wait to hear from the rest of you as to what you want to do about the case. I feel that you've got a settlement. I'm going wait and see what's done on appeal. If I need to reassess it, because I didn't do something right, I'll try and get it straightened out. But I just don't feel it would be appropriate for me to enjoin Mr. McMurry.

* * * *

RESPONSE OF BEVERLY MALONE TO DEFENDANT AMERICAN EQUITY'S MOTION FOR INJUNCTION AND SANCTIONS AND REQUEST FOR ORAL ARGUMENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:01-cv-1236-Orl-19DAB

CHARLES W. STRUBE, individually and as Trustee of the Charles W. Strube Revocable Living Trust, on behalf of himself and all others similarly situated, *et al.*

Plaintiffs,

vs.

AMERICAN EQUITY INVESTMENT
LIFE INSURANCE CO.,

Defendant.

RESPONSE OF BEVERLY MALONE TO DEFENDANT AMERICAN EQUITY'S MOTION FOR INJUNCTION AND SANCTIONS

- and -

REQUEST FOR ORAL ARGUMENT

****

Comes Beverly S. Malone, individually and on behalf of all others similarly situated, by counsel, and for her response to Defendant American Equity Investment Life Insurance Co.'s motion for injunction and sanctions (Doc. No. 255) states as follows:

[6] * * *

American Equity's motion is based on the interpretation it gives to the Class Order; specifically, its interpretation of the Court's rulings regarding the scope of the release. In spite of its statements to the Court during the Fairness Hearing, American Equity now brazenly suggests that the releasing language shields it from liability for any and all of the allegedly wrongful conduct at issue in Mrs. Malone's litigation.

Mrs. Malone, on the other hand, believes that the Court was clear in holding that the releasing language is not to be interpreted so broadly.

* * *

BEVERLY MALONE'S SUPPLEMENTAL RESPONSE TO PROPOSED REVISIONS TO CLASS SETTLEMENT

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:01-cv-1236-Orl-19DAB

Charles W. Strube, et. al.

Plaintiffs,

vs.

American Equity Investment Life Insurance Company,

Defendant.

Beverly Malone's Supplemental Response to Proposed Revisions To Class Settlement

* * *

[6] * * *

2. American Equity was aware that Addison's "business model" involved the sale of annuities in conjunction with the marketing of living trusts and agreed to help fund the marketing venture. Accordingly, the Court should reject the proposed release because it insulates American Equity from potential liability arising from the sale of living trusts.

As noted above, Ms. Malone's objection to the scope of release also includes the release of substantial and viable claims that were never litigated. Though Strube's counsel claims that "American Equity had absolutely nothing to do with the trust mill scheme", the evidence presents a starkly different view. (See, Plaintiff's Response to Objections to Proposed Class Settlement, p. 2-3). Because the evidence strongly points [7] to the conclusion that American Equity was involved in the scheme to market annuities through the sale of living trusts, the Court should reject the settlement because the relief does not adequately compensate class members for releasing these claims.

* * * *

BRIEF OF APPELLANT BEVERLY S. MALONE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11461-GG

CHARLES W. STRUBE, individually and as Trustee of the Charles W. Strube Revocable Living Trust, on behalf of himself and all others similarly situated, et al.,

Plaintiffs,

BEVERLY S. MALONE,

Plaintiff-Appellant,

v.

AMERICAN EQUITY INVESTMENT LIFE INSURANCE CO.,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida, Orlando Division

BRIEF OF APPELLANT BEVERLY S. MALONE

[2] STATEMENT OF THE ISSUES

1. Did the district court err in approving a class action release that could operate to release American Equity from

potential liability for wrongful conduct based on an entirely different factual predicate than that alleged, presented, pursued, litigated and settled in this case?

2. If not, was the class settlement fair, adequate and reasonable in light of the release of one or more class members' unlitigated claims?

* * *

SUMMARY OF ARGUMENT

[17] * * *

Simply put, Mrs. Malone asks this Court to rule on an issue that she has found no court opinion or other legal authority addressing; namely, what is the effect of an inconsistency between the language of a class action release and the district court's interpretation of that language in approving the release? In other words, does the *Strube* settlement release only those claims **relating directly** to the marketing and sale of equity indexed annuities, as the district court found; or does *Strube* release American Equity and its agents from all potential liability for any conduct, regardless of whether that conduct was alleged in *Strube,* so long as it is **in any way related to or connected with, in whole or in part,** the sale of those annuities, as American Equity now insists?

* * * *

REPLY AND RESPONSE BRIEF OF APPELLANT/APPELLEE BEVERLY S. MALONE

No. 05-11461-JJ & 05-13014-JJ

In the United States Court of Appeals
for the Eleventh Circuit

CHARLES W. STRUBE, individually and as Trustee of the Charles W. Strube Revocable Living Trust, on behalf of himself and all others similarly situated, et al.,

Plaintiffs-Appellees,

BEVERLY S. MALONE,

Plaintiff-Objector/Appellant/Appellee,

v.

AMERICAN EQUITY INVESTMENT LIFE INSURANCE CO.,

Defendant-Appellee/Appellant,

On Appeal from the United States District Court for the Middle District of Florida, Orlando Division

REPLY AND RESPONSE BRIEF OF APPELLANT/APPELLEE BEVERLY S. MALONE

[4] * * *

REPLY & RESPONSE ARGUMENTS

I. The District Court Approved the Proposed Settlement Based on a Misunderstanding of the Legal Effect of the Release Provisions

There is no dispute that the district court's opinion approving the settlement is "at odds" with the language of the proposed release.

* * * *